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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 991

FULLER HOLT, CLAUDE HOLT, MILTON JAMES HOLT, FRANK T. KEENER, E. D. HOLT, AND MRS. E. D. HOLT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 288 F. 2d 447.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1961 (Pet. App. A). A petition for rehearing was denied on April 25, 1961. The petition for a writ of certiorari was filed on May 23, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the fact that one of the co-conspirators was a paid government informer constituted unlawful entrapment in the circumstances of this case.

2. Whether the evidence is sufficient to sustain a finding of one continuing conspiracy.

STATEMENT

The six petitioners and seven others were indicted in the Northern District of Georgia for conspiring to violate the internal revenue laws of the United States relating to the manufacture, possession, and concealment of non-tax-paid distilled spirits, and substantive offenses related to the conspiracy. All six petitioners were found guilty on the conspiracy count. Fuller Holt was also found guilty of having in his possession 680 pounds of sugar, intended for use in the manufacture of non-tax-paid distilled spirits (26 U.S.C. 5686). E. D. Holt and Mrs. E. D. Holt were found guilty of having in their possession 1,460 pounds of sugar, intended for use in the manufacture of non-tax-paid distilled spirits (26 U.S.C. 5686), and having in their possession 480 gallons of non-tax-paid whiskey (26 U.S.C 5008). In addition, Fuller Holt, Milton Holt and E. D. Holt were convicted for possession of a non-registered distillery (26 U.S.C. 5601). The other seven defendants were acquitted in all respects.

Fuller Holt and E. D. Holt were sentenced to fifteen months imprisonment, and Claude Holt and Milton James Holt to twelve months imprisonment. Mrs. E. D. Holt and Frank Keener were placed on three years probation.

The evidence leading to these convictions may be summarized as follows:

In December 1958, one Lowman informed Padgett that petitioner E. D. Holt wanted the two of them to work at a distillery located in Murray County, Georgia.[1] (Tr. 33, 35) Padgett and Lowman then spent the night at E. D. Holt's home, where the matter of working at the still was discussed further (Tr. 33–34, 36–37, 89). Padgett testified that he, Lowman and one Wofford worked at this still for two days beginning December 26, 1958, and that he was paid ten cents a gallon by E. D. Holt (Tr. 37, 48). Padgett and the two others then walked to petitioner Keener's home and Keener drove all three back to E. D. Holt's house (Tr. 40–41).

Two days later, Padgett returned to E. D. Holt's house and met petitioners Fuller Holt and Claude Holt, father and brother of E. D. Holt (Tr. 41–42). Padgett's testimony also showed that petitioner Mrs. E. D. Holt had stated in his presence that she had gone to Gainesville to pick up a load of coke and boiler glass for the still (Tr. 86–87). During that same evening, Fuller Holt and Claude Holt loaded some malt on E. D. Holt's truck (Tr. 42). E. D. Holt and Padgett proceeded to transport the malt to the Murray County still site, but first stopped at petitioner Keener's home where fifty-seven cases of

[1] Three still sites are involved in this case. Still number one was located in Murray County and will be referred to as the Murray County still. Still number two was located in Gilmer County and will be referred to as the Gilmer County still. Still number three was located on the Cicero Wright place and will be referred to as the Cicero Wright still.

non-tax-paid whiskey were picked up for redistilling (Tr. 43–45). Approximately forty to fifty cases of distilled spirits were manufactured at the still the following day (Tr. 46).

In the early part of January 1959, operations at the Murray County still were terminated and Padgett was told that his services would be needed at another still yet to be set up (Tr. 549).

On or about January 18, 1959, Padgett, of his own volition, contacted Alcohol and Tobacco Tax investigator Duff L. Floyd and told the agent of the distilling activities in which he (Padgett) had participated (Tr. 93, 361). Padgett was paid $75.00 for the information, and an arrangement was made whereby he would receive further pay for more information regarding "the Holt gang" (Tr. 95, 362). No promises regarding any future prosecution for his part in the distillery operations were made (Tr. 94–95, 116); instead, he was warned that he could be prosecuted for his role in the illegal activities (Tr. 127, 244, 326–328, 386).

On the evening of January 20, 1959, two federal agents, accompanied by a state revenue agent, went to the distillery site described by Padgett and found it partially dismantled (Tr. 145–146, 148). The next morning the agents proceeded to the home of petitioner Keener and discovered 120 gallons of non-tax-paid whiskey stored in a bedroom (Tr. 147). The officers subsequently destroyed both the distillery and the whiskey (Tr. 147–148).

In March 1959, Padgett was contacted by petitioners E. D. Holt and Milton Holt to help set up a

still in Gilmer County on the property of Horace Parks (Tr. 49, 51). These three men set up a steam-type distillery (Tr. 50), but only Padgett and Milton Holt ran the actual operation (Tr. 53). On several occasions, E. D. Holt brought raw materials to the site (Tr. 54). Some 300 cases of whiskey were manufactured at this still (Tr. 55), but some two weeks thereafter the site was abandoned because of dissatisfaction with the property owner, Horace Parks (Tr. 54–55, 111). Padgett did not contact the federal agents during this period because the still did not "last long enough" (Tr. 111).[2]

Shortly after the Gilmer County still had been abandoned in the first part of April, Padgett was again contacted by petitioners E. D. Holt and Milton Holt (Tr. 57). He was asked to move his family to the Cicero Wright estate and operate a distillery there, and he agreed to do so (Tr. 58–60). E. D. Holt arranged that Padgett lease the property as "Fred Wilson" (Tr. 60–63). Padgett moved into the Cicero Wright place around April 10, 1959, and on April 20, 1959, he, together with petitioners Milton Holt, E. D. Holt, and Claude Holt, built a still on the premises (Tr. 67–68). The electric burner was the same one used in the Murray County still, and was brought to the Cicero Wright place by E. D. Holt (Tr. 70–71). Once the distillery apparatus was set up, Padgett, with the aid of Milton Holt, operated the still (Tr. 72).

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[2] Subsequent investigation, in September 1959, by federal agents corroborated the fact that a distillery had been in operation on Parks' property (Tr. 148–151).

On April 29, 1959, internal revenue agents located this still site, and talked to Padgett near the still (Tr. 152–153). Thereafter, they kept the still site, the Fuller Holt residence, and the E. D. Holt residence, under surveillance (Tr. 155–158, 161, 162, 164–165, 169–172, 175–178, 256–258, 275–278, 310–312, 355–358).

On May 15, 1959, the federal officers, under a search warrant, investigated petitioner Fuller Holt's premises. The officers found 1,200 gallons of apple pomace in one barn and 680 pounds of sugar in another (Tr. 180, 317). Also found on the premises were 1,600 pounds of corn malt (Tr. 180).

That same day, other federal officers, under a search warrant, executed a search on petitioner E. D. Holt's premises (Tr. 281). Thirty gallons of non-tax-paid whiskey were found in a bedroom of the E. D. Holt home, and 450 gallons were found across the road from the house (Tr. 276–277, 281–282, 291). The officers also found 1,480 pounds of sugar and 800 pounds of rye meal in the same bedroom where the whiskey was found (Tr. 281–283). Also on the premises were hogshead barrels, coke, an old upright boiler, and hose similar to that used on the Cicero Wright still (Tr. 283–285).

At the trial, six of the thirteen defendants took the stand, including petitioners Fuller Holt (Tr. 519–545) and Mrs. E. D. Holt (Tr. 454–502). None of these witnesses claimed any entrapment on the part of either Padgett or the government, but rather denied any wrongdoing whatsoever (Tr. 427–545).

ARGUMENT

1. The petitioners argue that the government should be estopped from prosecuting them because Padgett, a co-conspirator, was being paid by the government to gather information concerning the illegal manufacture of whiskey. But it is clear that at no time did Padgett, either on his own volition or under governmental inducement, approach the petitioners with any scheme to manufacture moonshine whiskey. To the contrary, it is plain from the evidence (see the Statement, *supra*, pp. 3–5) that, in each instance, Padgett's aid was solicited by either petitioner E. D. Holt or his brother, petitioner Milton James Holt (Tr. 33–37, 49, 57–60, 89, 549). In fact, Padgett's aid was first solicited approximately one month before Padgett contacted the internal revenue agents and before he was paid for the information concerning the illegal still (Tr. 33–37). The government did not pay Padgett for his acts in engaging in the liquor business; it paid him for information he supplied about activities for which he was hired by the petitioners. The short of it is that the government did not induce innocent people to engage in wrongdoing but merely allowed a crime already in progress to continue until its full extent was revealed. Action of that type is proper governmental activity. *Sherman* v. *United States*, 356 U.S. 369, 373; *United States* v. *Roett*, 172 F. 2d 379, 381 (C.A. 3), certiorari denied, 336 U.S. 960; *Murray* v. *United States*, 250 F. 2d 489, 492 (C.A. 9), certiorari denied, 357 U.S. 932.

2. The claim that the evidence showed three conspiracies, rather than one as charged in the indictment, is wholly without merit. There was one general enterprise directed to violation of the laws relating to distilled spirits, using such still sites as were convenient. The fact that new members came into the conspiracy, or that old members withdrew, does not affect the finding of a single conspiracy where, as here, a common direction runs throughout. *Marino* v. *United States,* 91 F. 2d 691, 696 (C.A. 9), certiorari denied, 302 U.S. 764; *Lefco* v. *United States,* 74 F. 2d 66, 68 (C.A. 3).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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JUNE 1961.